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No. 310

In the Supreme Court of the United States

OCTOBER TERM, 1960

PUGET SOUND PULP & TIMBER CO., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court R. Op. 2–55)[1] are reported at 30 T.C. 398. The opinion of the Court of Appeals (Pet. App. A i–ii) is reported at 277 F. 2d 803.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1960. (Pet. App. B iii.) A petition for rehearing was denied on May 23, 1960. (Pet. 2.)

[1] These references are to pages of the Tax Court's slip opinion, copies of which were inserted in the printed record in the court below between page 117 and page 119. (See Pet. 2.)

The petition for a writ of certiorari was filed on August 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals—by reason of the provision of Section 732(c) of the 1939 Code that the Tax Court's determination of any question made "necessary solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court or agency except the Tax Court"—lacked jurisdiction to review, for alleged inconsistency or lack of findings, the Tax Court's denial of relief under Section 722(b)(1) or Section 722(b)(2).

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 732 [As added by Sec. 9, Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17]. REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.
>
> * * * * *
>
> (c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court. [26 U.S.C. 1952 ed. 732(c).]

STATEMENT

The taxpayer petitioned the Tax Court for a redetermination of the Commissioner's disallowance of its applications for relief under Section 722 of the 1939 Code as to its excess profits taxes [2] for the years 1940, 1941 and 1942. (R. 6–29; R. Op. 2–55.) The only issues presented to the Tax Court for decision related exclusively to the taxpayer's applications for relief under Section 722. (R. Op. 2, 44–45.) After a trial on the merits, the Tax Court, upon the basis of its extensive findings of fact (R. Op. 2–44) and opinion (R. Op. 44–45), decided (R. Op. 54–55; R. 119) that the taxpayer was not entitled to any relief or refund of excess profits tax under Section 722 for the years in question.

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[2] Briefly, under the Second World War excess profits tax law, Section 710 *et seq.* of the 1939 Code, a tax was imposed upon corporate profits in excess of a certain norm or level, called the "excess profits credit," deemed to represent the taxpayer's "normal" profits and computed upon either the taxpayer's average earnings during the "base period" (1936–1939) under Section 713 or upon the basis of invested capital under Section 714, whichever resulted in the lesser tax. However, in the case of certain enumerated "abnormalities" or conditions, relief from the resultant tax was granted primarily by Section 722—under which the tax would be computed upon the basis of a "constructive average base period net income," to be used if the taxpayer could establish that its base period income was not normal for any of the reasons specified in the statute and if it established "what would be a fair and just amount representing normal earnings." Section 722(a) of the 1939 Code, as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Section 222 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

Review in the court below was sought by the taxpayer only with respect to two issues:[3] (1) As to its right to relief under Section 722(b)(1) upon the ground that its base period production or operation was diminished by reason of its loss of Japanese orders for pulp in 1937 and 1938, allegedly as the result of war conditions within the meaning of Section 722(b)(1) of the 1939 Code and Section 35.722-3 (a) of Treasury Regulations 112—with respect to which the taxpayer contended that the Tax Court's ultimate finding or conclusion was inconsistent with its evidentiary findings; and (2) as to its right to relief under Section 722(b)(2) upon the ground that its business was depressed during the base period by reason of its loss of Japanese orders for pulp, which assertedly constituted the loss of a principal customer within the meaning of Section 722(b)(2) of

[3] No review was sought in the court below (cf. R. 125-127, 257-259 and Pet. 6-7) as to other issues, as to which the Tax Court concluded: (1) that the taxpayer was not entitled to relief under Section 722(b)(2) upon the ground that the business of its industry was depressed during the base period by reason of the alleged dumping of pulp by foreign producers in the domestic market (R. Op. 50), (2) that the taxpayer did qualify for relief under Section 722(b)(1) by reason of its loss of Chinese orders (R. Op. 49), and (3) that the taxpayer qualified for relief under Section 722(b)(4) by reason of an increase in capacity for production resulting from the construction of a new mill (R. Op. 50): as to the latter two issues, the Tax Court further concluded that the constructive increase in base period earnings attributable to the loss of Chinese orders and to the increased capacity resulting from the new mill was not sufficient to provide an "excess profits credit" which would exceed the credit allowed to the taxpayer on the invested capital method under Section 714 (R. Op. 55), and that hence the taxpayer was not entitled to any relief.

the Code and Section 35.722-3(b) of Regulations 112—with respect to which the taxpayer contended that the Tax Court had failed to make any ultimate findings. (R. 125–127, 257–259.)

The court of appeals, *per curiam,* declined to review, because of the prohibition of Section 732(c). (Pet. App. A i–ii.)

ARGUMENT

1. Since the determination of the issues with respect to which review was sought was plainly made "necessary solely by reason of * * * section 722," the court of appeals was clearly correct in holding that review was precluded by Section 732(c) of the Internal Revenue Code of 1939, *supra,* p. 2.

In declining review in the instant case, the Ninth Circuit merely followed its recent decision in *Helms Bakeries* v. *Commissioner,* 263 F. 2d 642, certiorari denied, 360 U.S. 903, rehearing denied, 361 U.S. 857,[1] as well as its earlier decision in *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596, certiorari denied, 332 U.S. 767.

2. This case presents the same basic question, as to the scope and effect of the prohibition of Section

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[1] By that decision the Ninth Circuit expressly overruled its earlier holding in *Helms Bakeries* v. *Commissioner,* 236 F. 2d 3—thereby removing the only divergence from the otherwise uniform pattern of appellate court decisions on this question.

Actually, review in the present case was sought at a time, in 1958, when the first *Helms Bakeries* decision apparently represented the governing rule in the Ninth Circuit, and the petition for review was based upon the theory of reviewability announced in the first *Helms Bakeries* decision. (R. 6, 120–128.)

732(c) against appellate review in Section 722 cases, as was presented in five cases in which petitions for certiorari were denied at the last two terms of this Court. *Brown Paper Mill Co.* v. *Commissioner,* 255 F. 2d 77 (C.A. 5), certiorari denied, 358 U.S. 906, rehearing denied, 358 U.S. 942; *Crowell-Collier Pub. Co.* v. *Commissioner,* 259 F. 2d 860 (C.A. 2), certiorari denied, 358 U.S. 928; *Bradford Machine Tool Co.* v. *Commissioner,* 260 F. 2d 950 (C.A. 6), certiorari denied, 359 U.S. 909; *Helms Bakeries* v. *Commissioner, supra; United States Rubber Co.* v. *Commissioner,* 274 F. 2d 307 (C.A. 2), certiorari denied, 363 U.S. 827.

3. The review sought in this case—for alleged inconsistencies in, or lack of, findings (Pet. 6–7, 11)—was substantially identical to that sought in *Helms Bakeries, Crowell-Collier Pub. Co.,* and *Brown Paper Mill Co.* The assertions of deprivation of property without due process of law (Pet. 2–3, 7, 11) and violation of "constitutional rights" (Pet. 9, 10, 12–14) are really premised upon nothing more than the alleged inconsistencies or lack of findings.[5] These

[5] Since relief under Section 722 is granted as a matter of legislative grace, various challenges (see Pet. 9, 12–14) to the power of Congress to deny appellate review of Tax Court decisions on such relief questions have been repeatedly rejected by appellate courts beginning with the *Waters* case—the first case in which such review was sought—and this Court has repeatedly denied certiorari.

allegations are substantially similar to those urged in support of the petitions in *Brown Paper Mill, Crowell-Collier,* and *Helms Bakeries,* and no additional constitutional problem is presented by the petition in this case.

4. There is no conflict, as claimed (Pet. 15–17), with *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C.A. 8); *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. 2d 236 (C.A. 2), certiorari denied, 346 U.S. 876; *Stern & Stern Textiles, Inc.* v. *Commissioner,* 263 F. 2d 538 (C.A. 2), certiorari denied, 361 U.S. 831; *Headline Publications, Inc.* v. *Commissioner,* 263 F. 2d 541 (C.A. 2); *H. Fendrich, Inc.* v. *Commissioner,* 192 F. 2d 916 (C.A. 7); and *United States* v. *California Eastern Line,* 348 U.S. 351. The *California Eastern Line* case involved a statute basically different from Section 732(c). In *Packer Pub. Co.,* notwithstanding certain somewhat confusing statements in its opinion, all that the Eighth Circuit did was to remand the case to the Tax Court to consider the right to relief under Section 711(b)(1)(J)—which the Tax Court had not passed upon apparently because the issue had not been timely raised. All of the other cases involved review with respect to matters other than the right to relief under Section 722 itself.

CONCLUSION

The decision of the Court of Appeals is correct, there is no conflict of decisions, and the case presents no question warranting review by this Court. The petition should therefore be denied.

Respectfully submitted.

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